Supreme Court, U.S.
FILED
FEB 2 2002
OFFICE OF THE CLERK

No. 01-1118

IN THE

Supreme Court of the United States

JOSEPH SCHEIDLER, *ET AL.*,

Petitioners,

vs.

NATIONAL ORGANIZATION FOR WOMEN, *ET AL.*,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

RESPONSE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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188

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

I. WHETHER PRIVATE LITIGANTS MAY OBTAIN INJUNCTIVE RELIEF UNDER CIVIL RICO 1

II. WHETHER HOBBS ACT EXTORTION COVERS MERE INTERFERENCE WITH ANOTHER'S RIGHTS 2

A. Conflict with *United States v. Enmons* 2

B. Bizarre and Novel Nature of Claim that "Interference" Equals "Extortion" 5

C. Distortion of "Property" to Include "Intangible Rights" 5

D. Conflict with the Ninth Circuit 7

E. Pandora's Box 7

III. WHETHER THE ASSOCIATIONAL LIABILITY IMPOSED IN THIS CASE VIOLATED THE FIRST AMENDMENT 11

CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES

Cleveland v. United States, 531 U.S. 12 (2000) 6, 7

Jacques Ferber, Inc. v. Bateman, No. 99-CV-2277 (E.D. Pa. filed May 3, 1999) 8

Mariah Boat, Inc. v. Laborers Int'l Union of North America, 19 F. Supp. 2d 893 (S.D. Ill. 1998) 4

McNally v. United States, 483 U.S. 350 (1987) 6

Monterey Plaza Hotel Limited Partnership v. Local 483 of the Hotel Employees and Restaurant Employees Union, AFL-CIO, 215 F.3d 923 (9th Cir. 2000) 7, 9

NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) 4, 11, 12

Northeast Women's Center Inc. v. McMonagle, 868 F.2d 1342 (3d Cir.), *cert. denied*, 493 U.S. 901 (1989) 8, 9, 10

NOW v. Scheidler, 510 U.S. 249 (1994) 12

NOW v. Scheidler, 223 F.2d 615 (7th Cir. 2000) 11

Overnite Transp. Co. v. International Bhd. of Teamsters, 168 F. Supp. 2d 826 (W.D. Tenn. 2001) 4

Stephens Group, Inc. v. Voices for Animals, No. 00:5518 (JEI) (D.N.J. First Amended and Supplemental Complaint filed Apr. 17, 2001) 8

United States v. Enmons, 410 U.S. 396 (1973) 2-5

United States v. Panaro, 266 F.3d 939 (9th Cir. 2001) 7

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

U.S. Const. amend. I 11, 12

U.S. Const. amend. V 9

18 U.S.C. § 1951(b)(2) . . . . . 2, *passim*

Fed. R. App. P. 28(j) 7

S. Ct. R. 12.6 1

OTHER AUTHORITIES

Bradley, *Symposium: RICO Thirty Years Later: A Comparative Perspective* -- NOW v. Scheidler *Round Two*, 27 Syracuse J. Int'l L. & Com. 233 (2000) 11

"Furriers file a RICO suit over animal rights projects," The Star-Ledger (Aug. 6, 1999) 8

"Furrier files RICO Suit to Halt Anti-Fur Protesters' Excesses," 15 Civil RICO Litigation Rptr. No. 9, p. 3 (May 1999) 8

Getman, *Explaining the Fall of the Labor Movement*, 41 St. Louis U.L.J. 575 (1997) 4

Oversight Hearing Addressing the Civil Application of the Racketeering Influenced and Corrupt Organization Act (RICO) to Nonviolent Advocacy Groups, Before the Subcomm. on Crime of the House Comm. on the Judiciary, 105th Cong., 2d Sess. (1998) 8

INTRODUCTION

Operation Rescue (OR), like the petitioners Joseph Scheidler *et al.* [hereafter "Scheidler Defendants"], was a defendant in the trial court and an appellant in the Seventh Circuit in the present case. OR has filed a petition for a writ of certiorari [hereafter "OR Pet."], docketed in this Court as *Operation Rescue v. National Organization for Women*, No. 01-1119.

OR is a nominal respondent, under this Court's Rule 12.6, with regard to the petition of the Scheidler Defendants [hereafter "Scheidler Pet."], docketed as *Scheidler v. National Organization for Women*, No. 01-1118. Pursuant to Rule 12.6, OR respectfully files this response in support of the Scheidler Defendants in No. 01-1118.

OR urges this Court to grant both petitions -- in Nos. 01-1118 and 01-1119 -- and set them down for plenary consideration.

I. WHETHER PRIVATE LITIGANTS MAY OBTAIN INJUNCTIVE RELIEF UNDER CIVIL RICO

OR fully supports the Scheidler Defendants' presentation of this question, which complements that of OR. *See* OR Pet. § I.

In this case, the Seventh Circuit held, in conflict with the Ninth Circuit (and virtually every other court to address the issue), that a private party may obtain injunctive relief under civil RICO. The pertinent statutory text and history, and the relevant precedent, overwhelmingly demonstrate that RICO does not authorize private parties to obtain injunctive relief. *Id.*[1]

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[1]Tellingly, NOW and the abortion business co-plaintiffs (respondents here) themselves did not originally claim entitlement to injunctive relief under RICO. The Amended Complaint, filed in 1989, was the first pleading (continued...)

II. WHETHER HOBBS ACT EXTORTION COVERS MERE INTERFERENCE WITH ANOTHER'S RIGHTS

OR fully supports the Scheidler Defendants' presentation of this question as well. *See* OR Pet. § II.

The Seventh Circuit held in this case that merely causing "a loss to, or interference with the rights of," another person is "all that is required" to satisfy the "obtaining of property" element of Hobbs Act extortion, 18 U.S.C. § 1951(b)(2). *See* Scheidler Pet. App. 29a. Several points about this holding merit brief elaboration.

A. Conflict with *United States v. Enmons*

The Scheidler Defendants correctly point out that the result in *United States v. Enmons*, 410 U.S. 396 (1973), would have to be different under the rationale of the decision below. Indeed, the Seventh Circuit's distorted view of Hobbs Act extortion is radically at odds with both the majority and the dissent in *Enmons*.

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[1](...continued)
to invoke RICO. That pleading, and the subsequent Second Amended Complaint, specified the relief sought under each separate claim. In both pleadings, plaintiffs expressly sought injunctive relief under Count I -- the antitrust claim -- but did not mention any request for an injunction under the RICO counts (Counts II-IV). *See* Am'd Cplt. at 29-30, 38, 40, 41; 2d Am'd Cplt. at 29-30, 38, 40, 41. (The Second Amended Complaint appears in the Joint Appendix in *NOW v. Scheidler*, No. 92-780 (O.T. 1993), at pp. 39-80.) It was only in the Third Amended Complaint, filed on remand after this Court's 1994 ruling, that plaintiffs first claimed an entitlement to injunctive relief under RICO. 3d Am'd Cplt. at 35-36. The motivation seems plain: once the lower courts rejected the plaintiffs' antitrust claim in the Second Amended Complaint, plaintiffs decided to try to make new law under RICO as a replacement basis for injunctive relief.

In *Enmons*, the question was whether the Hobbs Act applied to labor violence in support of higher wages and other employee benefits. This Court divided 5-4 over the question, with the majority holding that "the use of violence to achieve legitimate union objectives" was not the "wrongful" obtaining of property for purposes of Hobbs Act extortion. 410 U.S. at 400. But not a single Justice suggested that the violent destruction of property that had occurred in that case could itself qualify as the extortionate "obtaining" of property under the Hobbs Act. Yet the decision below endorses precisely such a theory. *See* OR Pet. at 20-21; Scheidler Pet. at 19-20.

The decision below would plainly nullify the holding in *Enmons*. Instead of prosecuting violent union protesters for the extortionate obtaining of better wages and benefits (an "obtaining" that, under *Enmons*, is not "wrongful"), prosecutors -- under the Seventh Circuit's faulty rationale -- could simply charge the protesters with extortionate "obtaining" of the property or rights damaged or interfered with, i.e., by "causing a loss to, or interfering with the rights of" (Scheidler Pet. App. 29a) others. The "obtaining of property" element would be satisfied by the damage to transformers (as in *Enmons*) or to other company property, or by interference with the liberty of management or employees, for example, to cross the strike line. Scheidler Pet. at 22. The legitimacy or wrongfulness of the ultimate "obtaining of wages" would be irrelevant, because the unlawful "obtaining-by-interference," according to the court below, would satisfy the Hobbs Act.

The rationale of the decision below would thus render meaningless the entire debate in *Enmons*. Whether obtaining higher wages is "wrongful" or not under the Hobbs Act is wholly beside the point if wrongful "obtaining property" (as opposed to wrongful "causing a loss" or "interference with

rights," Scheidler Pet. App. 29a) is not even a necessary element of Hobbs Act extortion.[2]

The *Enmons* majority was insistent that the Hobbs Act would not proscribe misconduct on a picket line, even a physical assault. 410 U.S. at 404-05. The dissent was even more emphatic, dismissing the notion that a "fistfight on a picket line" could violate the Hobbs Act as "nonsense." *Id.* at 418 n.17 (Douglas, J., dissenting). Yet in the present case it was precisely demonstration misconduct -- the nonviolent sit-ins themselves, plus several scattered[3] incidents of alleged

[2]The potential for businesses to use RICO actions based on an expansive concept of Hobbs Act extortion against union activists has not gone unnoticed by judges and commentators. *See, e.g.*, Getman, *Explaining the Fall of the Labor Movement*, 41 St. Louis U.L.J. 575, 579 (1997) ("Union pressure tactics ranging from picket line insults to corporate campaigns have become increasingly vulnerable to legal actions in tort or under the RICO statute"); *Overnite Transp. Co. v. International Bhd. of Teamsters*, 168 F. Supp. 2d 826, 841-43 (W.D. Tenn. 2001) (expressing concern over expansive reading of state and federal extortion laws as RICO predicates for civil suits against coercive labor activities: "If any coercive conduct on the part of picketers and strikers constitutes extortion, seemingly every 'garden variety' unfair labor practice will be swept into the fold of RICO"). *See also Mariah Boat, Inc. v. Laborers Int'l Union of North America*, 19 F. Supp. 2d 893, 896 (S.D. Ill. 1998) (RICO suit based on Hobbs Act extortion counts against union activists who, among other things, "disrupted . . . manufacturing facilities and dealer shows through mass picketing and leaflet distribution"); *id.* at 901 & n.4 (finding *Enmons* inapplicable).

[3]A comparison with *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), is instructive. In *Claiborne*, there were at least ten violent incidents in one county of Mississippi over a seven-year period. *Id.* at 888, 893, 898, 904-06, 920. In the present case, the jury found only four (unspecified) acts or threats of violence, OR Pet. at 4 n.5, in the context of nationwide demonstrations over a fourteen-year period, *id.* at 6-7. This Court described the violent acts in *Claiborne* as "isolated," 458 U.S. at 924, and "relatively few," *id.* at 933. *A fortiori*, the same is true here.

violence[4] -- that formed the very core of both respondents' case and the jury's verdict, as well as the basis for the Seventh Circuit's affirmance under the Hobbs Act. OR Pet. at 3-4 & nn. 2-6; Scheidler Pet. App. 2a, 19a, 29a.

B. Bizarre and Novel Nature of Claim that "Interference" Equals "Extortion"

It would be difficult to overstate the novelty -- and bizarre nature -- of NOW's theory, endorsed by the court below, that "interference with rights" equals the extortionate "obtaining of property."

Significantly, no state or federal criminal extortion charges were brought for *any* of the dozens of supposedly extortionate sit-ins or other acts on which the RICO claim was based. *See, e.g.*, Tr. 1777-78 (Lt. Pyrdum); RICO Case Statement [Amended] (Oct. 31, 1994) at 5-6, Ex. A, B (listing criminal charges/convictions for alleged predicate acts, none of which are for "extortion"). Indeed, it would be bizarre for a prosecutor to charge that a sit-in protest was felony "extortion," yet that was precisely NOW's theory (embraced by the court below). As this Court stated in an analogous context, "[i]t is unlikely that if Congress had indeed wrought such a major expansion of criminal jurisdiction in enacting the Hobbs Act, its action would have so long passed unobserved." *Enmons*, 410 U.S. at 410.

C. Distortion of "Property" to Include "Intangible Rights"

The most obvious flaw in the Seventh Circuit's "extortion" theory is that the defendants (and others "associated" with them) did not "obtain" -- as opposed to "interfere with" or

[4]The defendants vigorously deny any charge of violence. OR Pet. at 6 & n.9. Indeed, OR demanded all "rescue" demonstration participants to sign a pledge of nonviolence. *Id.*

"impair" -- the supposed "property." But a second major flaw also plagues the Seventh Circuit's approach: the court below swept intangible rights into the definition of property that can be "obtained" under the Hobbs Act. *See* Scheidler Pet. at 17-20, 22.[5] This Court has repeatedly distinguished between "property," on the one hand, and "intangible rights," on the other, when construing the "obtaining property" element of federal criminal statutes. *E.g.*, *McNally v. United States*, 483 U.S. 350, 356, 358, 360 (1987); *Cleveland v. United States*, 531 U.S. 12, 23-24 (2000).

The Seventh Circuit's essentially limitless theory of property rights, like the prosecution theories in *Cleveland*, must be rejected "not simply because they stray from traditional concepts of property," 531 U.S. at 24, but also because this approach "invites . . . a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement from Congress," *id.* This Court warned in *Cleveland* that a novel expansion of the statutory term "property" "would subject to federal . . . prosecution a wide range of conduct traditionally regulated by state and local authorities." *Id.* The same concern applies here. Scheidler Pet. at 21-22.

Invoking the rule of lenity, this Court noted in *Cleveland* that any ambiguity about the term "property" must be resolved in favor of a less expansive meaning. 531 U.S. at 25. Highly apropos of the present case, this Court found the rule of lenity "especially appropriate" in construing a federal crime which "is a predicate offense under RICO," *id.*

[5]This issue was also argued in the court below. *See* Brief and Short Appendix for Defendant-Appellant Operation Rescue at 38-39. The Seventh Circuit rejected the argument. Scheidler Pet. App. 29a.

The Seventh Circuit disregarded[6] this Court's unanimous and pointed admonitions in *Cleveland*, and instead read the Hobbs Act in a novel and expansive manner that puts federal prosecutors and private RICO plaintiffs in charge of policing demonstration misconduct.

D. Conflict with the Ninth Circuit

The Scheidler Defendants correctly point out that the Seventh Circuit's extortion holding conflicts with the Ninth Circuit's embrace of a proper understanding of the "obtaining property" element of Hobbs Act extortion in *United States v. Panaro*, 266 F.3d 939 (9th Cir. 2001). *See* Scheidler Pet. at 16-17; OR Pet. at 22. *Panaro* is by no means an isolated decision. *See Monterey Plaza Hotel Limited Partnership v. Local 483 of the Hotel Employees and Restaurant Employees Union, AFL-CIO*, 215 F.3d 923 (9th Cir. 2000). In *Monterey*, the Ninth Circuit noted that the *impairment* of a business's goodwill, even if that goodwill could be considered property for some purposes, was not the *obtaining* of property. *Id.* at 926. (*Monterey* addressed the "obtaining property" element of the federal mail and wire fraud statutes; the Hobbs Act contains the same element.) The defendants simply did not "*obtain* property," *id.* (emphasis in original), the court explained: their "conduct may have been vexatious or harassing, but it was not *acquisitive*," *id.* at 927 (emphasis added).

E. Pandora's Box

The Scheidler Defendants correctly point out that the Seventh Circuit's gross overreading of the Hobbs Act, to cover

[6]In a notice of supplemental authority, *see* Fed. R. App. P. 28(j), OR had called the attention of the court below to the *Cleveland* decision. (The opinion in *Cleveland* was announced after oral argument had been held in the Seventh Circuit in the present case.)

mere interference with someone's rights, can be used not just against pro-life demonstrators but also protesters of all political persuasions. Scheidler Pet. at 21-22. This is not mere speculation. Civil RICO is already being invoked against protesters of various political stripes. *See, e.g., Oversight Hearing Addressing the Civil Application of the Racketeering Influenced and Corrupt Organization Act (RICO) to Nonviolent Advocacy Groups, Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 105th Cong., 2d Sess. (1998) (www.house.gov/judiciary/35055.htm) (testimony of Jeffrey S. Kerr, General Counsel, People for the Ethical Treatment of Animals) (civil RICO suit filed against anti-vivisection protesters); *Stephens Group, Inc. v. Voices for Animals*, No. 00:5518 (JEI) (D.N.J. First Amended and Supplemental Complaint filed Apr. 17, 2001) (laboratory and its shareholder adding civil RICO claims against animal rights groups); *Jacques Ferber, Inc. v. Bateman*, No. 99-CV-2277 (E.D. Pa. filed May 3, 1999) (civil RICO suit filed against anti-fur protesters); "Furrier files RICO Suit to Halt Anti-Fur Protesters' Excesses," 15 Civil RICO Litigation Rptr. No. 9, p. 3 (May 1999) (same); "Furriers file a RICO suit over animal rights projects," The Star-Ledger (Aug. 6, 1999) (http://www.nj.com/jersey/ledger/c8d3da.html) (federal civil RICO suit filed in Newark, New Jersey, against animal rights groups).[7]

Concern about the propagation of such suits prompted the

[7]The fact that the cited cases were filed in district courts within the Third Circuit is no coincidence. In *Northeast Women's Center Inc. v. McMonagle*, 868 F.2d 1342 (3d Cir.), *cert. denied*, 493 U.S. 901 (1989), the Third Circuit opened the door to such suits by holding that protests which interfered with an abortion business constituted Hobbs Act extortion and thus were RICO predicates. The Seventh Circuit's adoption of a similarly distorted view of federal extortion in the present case will, unless corrected by this Court, doubtless spawn its own clones.

environmental group Greenpeace USA to file an *amicus* brief in the *Monterey* case (*supra* § II(D)) urging the Ninth Circuit to reject expansive interpretations of the Hobbs Act's prohibition against the "obtaining" of "property" through extortionate means. Specifically, Greenpeace expressed the concern -- highly pertinent to the present case -- that the Hobbs Act's prohibition on extortion was "now being employed by corporations to describe *any* interference by protestors with their business," a development that "represents a radical and untenable expansion of the Hobbs Act which threatens to criminalize and federalize political protest all over the United States." Brief of *Amicus Curiae* Greenpeace USA in Support of Appellee Hotel Employees and Restaurant Employees, Local 483, *Monterey Plaza Hotel Limited Partnership v. Local 483 of the Hotel Employees and Restaurant Employees Union, AFL-CIO*, No. 99-16714 at 3, 4 (9th Cir. filed Jan. 20, 2000) (hereafter "Greenpeace Br.") (emphasis in original).[8] Greenpeace traced this development to cases such as *Northeast Women's Center v. McMonagle*, 868 F.2d 1342 (3d Cir.), *cert. denied*, 493 U.S. 901 (1989), which it said reflect a "judicial reaction" to anti-abortion protests but which rest on a "fundamental error": they "create out of thin air a federal common law of intangible property rights that is radically more expansive than the law recognizes in any other context," including "under the Fifth Amendment Takings Clause, environmental law, bankruptcy law, [and] the common law of conversion," Greenpeace Br. at 3-5; *see also id.* at 6-13 (discussing definitions of "property" in these other settings).

Greenpeace went on to express concern that numerous activities of its members and other environmental activists --

[8]For the Court's convenience, OR is lodging copies of the Greenpeace brief with the Clerk's office.

such as "demonstrat[ions] at the headquarters of a leading producer of genetically modified food" -- would violate the Hobbs Act under the expansive interpretations adopted in abortion protest cases such as *McMonagle*. Greenpeace Br. at 2, 3-4. The group elaborated on this concern:

> Greenpeace protestors have faced the same legal consequences as other social activists, like Martin Luther King, Jr., in this country's long tradition of civil disobedience. Misdemeanor prosecutions for trespass and nuisance are not uncommon for Greenpeace activists. However, the unwarranted and dramatic expansion of Hobbs Act extortion to misdemeanors, urged in this case, would add a poison arrow to the already well-stocked quivers of large corporations. RICO suits, fortified by felony convictions, treble damages and giant attorneys' fees, could be easily used to cripple activist groups like Greenpeace and drive any social interest campaign out of the public arena. Greenpeace has a deep interest in making certain that political protestors do not get treated as criminal extortionists.

Id. at 2-3.

The Southern Christian Leadership Conference voiced similar concerns in an *amicus* brief that the SCLC sought, without success, to file with the Seventh Circuit in this case.[9]

[9]*See* Motion of the Southern Christian Leadership Conference for Leave to File Brief and Brief Amicus Curiae in Support of the Defendant-Appellants Joseph Scheidler, Pro-Life Action League, Inc., Andrew Scholberg, and Timothy Murphy, *NOW v. Scheidler*, Nos. 99-3076, 99-3336, 99-3891, & 99-3892, at 2 (7th Cir. Feb. 8, 2000) (arguing that "if the interpretation of RICO now being challenged is allowed to stand, SCLC and the entire nonviolent civil protest movement would be placed in serious peril"). Copies of the SCLC's proposed brief are also being lodged with the

(continued...)

That amicus brief urged reversal of the RICO judgment at issue here.

III. WHETHER THE ASSOCIATIONAL LIABILITY IMPOSED IN THIS CASE VIOLATED THE FIRST AMENDMENT

OR fully supports the Scheidler Defendants' presentation of this question. *See* OR Pet. § IV. *See also supra* note 3.

It is worth adding, moreover, that individuals and groups who do not necessarily share the defendants' views on abortion have nonetheless recognized the serious risks to (or infringement of) defendants' First Amendment rights in this case. For example, Professor Craig Bradley has concluded that the trial court's jury instructions "violate[d] the precision of regulation required by [*NAACP v.*] *Claiborne* [*Hardware Co.*, 458 U.S. 886 (1982)]." Bradley, *Symposium: RICO Thirty Years Later: A Comparative Perspective* -- NOW v. Scheidler *Round Two*, 27 Syracuse J. Int'l L. & Com. 233, 238 (2000); *see also id.* at 235 n.13 (noting that Prof. Bradley disagrees with the Scheidler defendants' views about abortion). Professor Bradley has also argued that RICO's imposition of treble damages is "clearly not allowed" under the restrictions on damages awards set forth in *Claiborne*. *Id.* at 236-37. And when this case was last before this Court, the ACLU filed a brief at the merits stage emphasizing the special risks to First Amendment rights that arise when "civil RICO actions [are] brought against ideological associations," especially given RICO's "amorphous nature" and "the availability of treble damages." Brief Amicus Curiae of the American Civil

[9](...continued)
Clerk's office. The Seventh Circuit rejected the SCLC submission under that court's restrictive policy concerning *amicus* briefs. *See NOW v. Scheidler*, 223 F.2d 615, 616-17 (7th Cir. 2000).

Liberties Union in Support of Neither Party, *NOW v. Scheidler*, No. 92-780 (O.T. 1993), at 8, 15. The ACLU urged this Court, *id.* at 3, in the event of a remand, to provide specific guidance that would ensure that the mandate of *Claiborne Hardware* was strictly followed below and would provide much-needed guidance to the lower courts.

Members of this Court took special note of the serious First Amendment risks posed by RICO suits against protesters. *See NOW v. Scheidler*, 510 U.S. 249, 263-65 (1994) (Souter, J., joined by Kennedy, J., concurring). In view of the trial court's complete failure to follow *Claiborne Hardware*, and the Seventh Circuit's endorsement of that failure, the need for greater guidance identified by the ACLU is plainly no less pressing now than it was eight years ago.

CONCLUSION

This Court should grant both the Scheidler Defendants' petition for certiorari and Operation Rescue's petition for certiorari.

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February 20, 2002